

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 02-0089 CSET**  
**CONTROLLED SUBSTANCE EXCISE TAX**  
**FOR TAX PERIODS: 2001**

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**Issue**

**Controlled Substance Excise Tax: Imposition**

**Authority:** IC 6-7-3-19 (2), IC 6-8.1-3-1, IC 6-7-3-5, IC 6-7-3-13, IC 6-8.1-5-1 (b), Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax 1999).

The taxpayer protests the imposition of the controlled substance excise tax.

**Statement of Facts**

On August 17, 2001, controlled substances were found in the home of the taxpayer. The taxpayer's county prosecutor sent the Indiana Department of Revenue, hereinafter the "department," a letter requesting that the department institute a controlled substance excise tax investigation. The Indiana Department of Revenue issued a Record of Jeopardy Finding, Jeopardy Assessment, Notice and Demand on January 7, 2002 in a base tax amount of \$191,872.00. The taxpayer protested the assessment. At the request of the taxpayer's representative, the Letter of Findings was based upon the documentation in the file. Further facts will be provided as necessary.

**Controlled Substance Excise Tax: Imposition**

**Discussion**

The department can only commence an investigation into and collection of controlled substance excise tax after it is notified pursuant to the terms of IC 6-7-3-19 (2) as follows:

. . . in writing by the prosecuting attorney of the jurisdiction where the offense occurred that the prosecuting attorney does not intend to pursue criminal charges of delivery, possession, or manufacture of the controlled substance that may be subject to the tax required by this chapter.

In this case, the department received this notification by letter from the taxpayer's county prosecutor in the following words:

This letter is a request for you to continue the investigation of the above entitled cases for the Indiana State Department of Revenue. Both of our cases have been closed. Attached, you will find a copy of the plea agreement in these cases.

Pursuant to IC 6-8.1-3-1, the department's receipt of the prosecutor's request for an investigation transferred to the department the "primary responsibility for the administration, collection, and enforcement of the listed taxes."

After receipt of the prosecutor's letter, the department investigated the taxpayer's case and imposed the controlled substance excise tax on the taxpayer's possession of anabolic steroids in Indiana pursuant to IC 6-7-3-5. The assessment was issued as a jeopardy assessment as required at IC 6-7-3-13.

The department later received a second letter from the county prosecutor requesting that the department discontinue the collection of the controlled substance excise tax from the taxpayer. The department considered the prosecutor's request and determined to proceed with the collection of the tax.

Department assessments are presumed to be correct and the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1 (b).

Possession of the controlled substances can be either actual or constructive. Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax 1999). Although both direct and circumstantial evidence may prove constructive possession, proof of presence in the vicinity of controlled substances, presence on property where controlled substances are located, or mere association with the possessor is not sufficient. Hurst at 374-375. To prove constructive possession, there must be a showing that the taxpayer had not only the requisite intent but also the capability to maintain dominion and control over the substance. Hurst at 374.

In the Hall case, the department assessed controlled substance excise tax against a husband and wife. The couple owned and lived together in a residence. The wife testified that she had no knowledge of the presence of a controlled substance in the house. Marijuana, a controlled substance, was grown in a basement room with a locked door. Only the husband had a key to the room. The Court found that the wife did not have the capability to maintain dominion and control over the marijuana since she had no capability of entering the locked room containing the marijuana to exert any control over the growing operation. Therefore she did not constructively

possess the marijuana and the controlled substance excise tax was improperly imposed against the wife.

There are significant differences between the Hall case and the taxpayer's situation. The taxpayer is assessed tax on the anabolic steroids found in an unlocked closet in her bedroom. At the time of the arrest, the taxpayer told the police that she knew of the shipments of anabolic steroids received by her husband, knew of the controlled substances stored in her residence and used some of the controlled substances herself. Those self-incriminating statements made at the time of her arrest are more credible than the contradicting statements in taxpayer's May 2, 2002 affidavit or her husband's May 2, 2002 affidavit. The facts of this situation indicate that the taxpayer did intend to possess the anabolic steroids. The taxpayer had access to the anabolic steroids and the capability to maintain dominion and control over them. Thus, the taxpayer had constructive possession of the controlled substances found in her residence. The taxpayer failed to sustain her burden of proof that the controlled substance excise tax was improperly imposed.

### **Finding**

The taxpayer's protest is denied.